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No. 48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

ROSETTE SORGE SAVORGNAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, J. HOWARD McGRATH, THE ATTORNEY GENERAL FOR THE UNITED STATES OF AMERICA,, and WATSON B. MILLER, COMMISSIONER OF IMMIGRATION and NATURALIZATION SERVICE,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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8. *Mackenzie v. Hare*, 239 U. S. 299 (1915), which held that marriage of an American woman to a foreigner resulted in adoption by the wife of husband's nationality, without removal from this country, was predicated upon the ancient principle that the wife's citizenship became merged with that of her husband.

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 86-92) is reported at 171 F. 2d 155. The opinion of the District Court (R. 61-67) is reported at 73 F. Supp. 109.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254. The United States Court of Appeals for the Seventh Circuit in this case "decided an important question of federal law which has not been, but should be settled by this court" and "has decided a federal question in a way probably in conflict with applicable decisions of this court." (Supreme Court Rule 38 (5) (b).)

STATEMENT OF THE CASE

This is an action brought in the United States District Court for the Western District of Wisconsin for a declaratory judgment under the provisions of Section 503 of the Nationality Act of 1940 (U. S. C. Section 903) establishing the American citizenship of the plaintiff. The trial court entered judgment in favor of the petitioner which was reversed by the Court of Appeals.

The grant of the writ of certiorari by this Court presents two questions: (1) Did the petitioner lose her citizenship under the Act of March 2, 1907, or the Nationality Act of 1940, (a) By becoming naturalized in the foreign state of Italy; (b) By taking an oath of allegiance to the state of Italy; (c) By taking up a residence abroad; and (2) Did the plaintiff voluntarily become expatriated? These questions were answered in the affirmative by the Court of Appeals.

The petitioner was born in Reedsburg, Wisconsin on May [illegible] 1915 of native born parents (R. 64). From the date of her birth until July 15, 1941, the petitioner resided continuously in the United States (R. 64).

While she was employed in St. Louis in 1939, the petitioner became acquainted with Alessandro Savorgnan (R. 13), a diplomatic officer of the Italian Government (R. 9) to whom she was married in December, 1940.

Because of his employment with the diplomatic service, it was necessary for Savorgnan to obtain the consent of the Italian Government to marry the petitioner (R. 41). Such consent would not have been granted unless the prospective bride became an Italian citizen (R. 13, 14, 16, 41). Upon the assurance of her future husband that in acquiring Italian citizenship she would not lose her American citizenship (R. 10, 67), the petitioner on March 28, 1940, made application for Italian citizenship (R. 16, 61). By Royal Decree, dated August 25, 1940, the petitioner was granted Italian citizenship (R. 17) conditioned upon the petitioner taking an oath of allegiance (R. 44). The petitioner had no knowledge of such decree; she was simply advised over the telephone that permission had been granted for the marriage (R. 17).

On the 23rd day of November, 1940, at the request of her future husband, the petitioner signed a document in the Italian language which the petitioner could neither read, write, nor understand, containing a statement renouncing American citizenship, and an oath of allegiance to Italy (R. 19-20, 65). There was in fact no oath of allegiance administered to or taken by the petitioner; she simply signed the oath without any formalities (R. 19-20, 65-66).

On the 15th day of July, 1941, the petitioner's husband was compelled by Executive Order of the President of the United States to leave this country practically without notice, and without any opportunity for the petitioner to obtain an American passport (R. 65).

After arrival in this country, the plaintiff made application to the Commissioner of Immigration for a determination that she was an American citizen, and on the 28th of June, 1946, the Acting Commissioner of Immigration advised the plaintiff as follows (R. 1-2):

> "The matter was considered by the Commissioner, and in part he ruled as follows: 'The question is a perplexing one; the answer is not clear. Administrative practice over many years goes one way; the legal conclusions here expressed with persuasion go the other; the State Department has a third theory. This is the kind of matter which may never be settled with sureness until passed upon by the courts. Accordingly, the case should be decided against the claimant in the pending administrative proceedings. She may then seek judicial review if she so chooses.' "

The trial court found that the petitioner in signing the document containing the oath of allegiance assumed it was a step in obtaining the consent of the Italian Government to the marriage (R. 66); that there were no formal proceedings taken in connection with the signing of the document and that no oath was actually administered (R. 63); that at the time she signed the document, the petitioner had no intention of renouncing her allegiance to the United States (R. 66); that when she signed the document, the petitioner relied upon her husband's statement and assurance that she would not endanger her American citizenship (R. 67); that when the petitioner left this country she had no intention of establishing a permanent residence abroad or of abandoning her residence in the United States (R. 65); that because of the outbreak of the war, the petitioner was prevented from returning to the United States until 1945 (R. 65); that the petitioner did not vote in Italy but did vote

in the United States both before and after her marriage (R. 67). Lastly, the trial court found that the plaintiff did not knowingly renounce her American citizenship, and that she is now and has been since the date of her birth, a citizen of the United States (R. 67).

The trial court thereupon entered judgment decreeing that the petitioner had never lost or relinquished her United States citizenship, and that she is now and has been since the date of her birth, a citizen of the United States (R. 67). The Court of Appeals reversed the judgment of the trial court and held that the plaintiff lost her citizenship (a) by becoming naturalized in Italy under Section 2 of the Act of March 2, 1907, and by taking an oath of allegiance to Italy (R. 91).

The Court of Appeals further held upon the authority of *Mackenzie v. Hare*, 239 U. S. 299, that it was unnecessary under the 1907 Act, for the plaintiff to give up a residence in a foreign state in order to become expatriated (R. 89-90). Finally, the Court of Appeals held that if removal from this country was necessary to effect expatriation either under the Act of 1907 or the Nationality Act of 1940, the plaintiff became expatriated through the establishment of a residence in Italy (R. 92).

SPECIFICATION OF ERRORS

The Court of Appeals erred:

1. In holding that the petitioner became naturalized in the foreign state of Italy.

2. In holding that the petitioner took an oath of allegiance to the foreign state of Italy.

3. In holding that the petitioner took up a residence in Italy.

4. In holding that the acts of the petitioner prior to the enactment of the Nationality Act of 1940 resulted in naturalization in Italy under that Act.

5. In holding that petitioner voluntarily relinquished her American citizenship.

6. In holding that petitioner is not an American citizen.

SUMMARY OF ARGUMENT

I. THE PETITIONER WAS NOT NATURALIZED IN THE FOREIGN STATE OF ITALY.

1. The Court of Appeals held that the petitioner was naturalized in the foreign state of Italy.

2. Section 2 of the Act of 1907 provides for expatriation by naturalization "in" a foreign state.

3. The Court of Appeals interpreted the act to mean that naturalization "by" a foreign state was equivalent to naturalization in such foreign state.

4. Before the enactment of Section 2 of the Act of 1907, the authorities held that citizenship in a foreign state was not acquired except by removal to such country.

Talbot v. Jansen, 3 Dall. (3 U. S. 133) (1795)

The Santissima Trinidad, 7 Wheat. (20 U. S. 283) (1822)

Comitis v. Parkerson, 56 F. 556 (La. 1893)

5. Subsequent to the enactment of the Act of 1907 the statute was interpreted by the Secretary of State as requiring a foreign residence in order to acquire citizenship. 3 Hackworth *Digest of International Law*, 228-231.

6. *United States v. Karnuth*, 19 F. Supp. 581-582 (D. C. N. Y.) held that the Act of 1907 was merely declaratory of pre-existing law.

7. The right of citizenship is not to be destroyed by an ambiguity. *Perkins v. Elg*, 307 U. S. 325, 337.

8. *Mackenzie v. Hare*, 239 U. S. 299, which held that marriage of an American woman to a foreigner resulted in adoption by the wife of husband's nationality without removal from this country, was predicated upon the ancient principle that the wife's citizenship became merged with that of her husband.

9. The Nationality Act of 1940, subject to exceptions which are not here material, expressly requires removal to a foreign country in order to effect expatriation.

10. The petitioner was not naturalized in the foreign state of Italy.

II. THE PETITIONER DID NOT TAKE AN OATH OF ALLEGIANCE TO A FOREIGN STATE.

1. The trial court found that the petitioner merely signed an oath of allegiance without any formality which did not amount to the taking of an oath of allegiance.

2. The Court of Appeals did not determine whether the petitioner took an oath of allegiance except through the implication in its decision that the plaintiff became naturalized in a foreign state.

3. Expatriation does not result under the statute unless the petitioner actually swore to the oath of allegiance.

In the Matter of E——, In Exclusion Proceedings, decided by the Board of Immigration Appeals in 1943, Vol. 1, p. 548, Administrative Decisions Under Immigration and Naturalization Laws of the United States (1940-1943) and *In re Gogal*, 75 F. Supp. 268 (1947).

4. The effect of the signing of the document containing the oath of allegiance to Italy must be measured by the Act of 1907 and not by the Nationality Act of 1940.

5. The 1940 Nationality Act with respect to a declaration of allegiance to a foreign state is broader than the Act of 1907.

III. THE PETITIONER DID NOT TAKE UP A RESIDENCE ABROAD.

1. The trial court found that the petitioner did not establish a permanent residence abroad or abandon her residence in the United States.

2. The Court of Appeals reached an opposite conclusion.

3. The Nationality Act of 1940 requires residence abroad in order to accomplish expatriation.

4. The plaintiff did not establish a residence abroad within the meaning of the Nationality Act of 1940.

Anderson v. Watt, 138 U. S. 694

District of Columbia v. Murphy, 314 U. S. 441, 455

Sun Printing & Publishing Association v. Edwards, 194 U. S. 377, 383

Gilbert v. David, 235 U. S. 561, 569

Mitchell v. United States, 21 Wall. 350-353

5. The petitioner's status is dependent upon the Act of 1907.

6. Under the Act of 1907, expatriation did not follow unless a permanent residence was established outside the United States. 3 Hackworth *Digest of International Law* 231; *The Santissima Trinidad*, 7 Wheat. 283, 348; *Comitis v. Parkerson*, 56 F. 556, 560 (C. C. La.).

7. The conclusion of the Court of Appeals that the petitioner took up a residence in Italy is not supported by the evidence and should be set aside.

IV. THE PETITIONER DID NOT VOLUNTARILY ABANDON HER AMERICAN CITIZENSHIP.

1. The trial court found that the petitioner did not voluntarily abandon her American citizenship.

2. The Court of Appeals held that the intention of the petitioner was not controlling and that the question was whether she intended to act as she did.

3. The failure of the trial court to give effect to the petitioner's intention is contrary to *Knauer v. U. S.*, 328 U. S. 654 (1946) and *Perkins v. Elg*, 307 U. S. 325.

4. Citizenship is not lost except voluntarily. *Dos Reis ex rel. Camara v. Nicolls*, 68 F. Supp. 773 D. C. (Mass.) 161 F. 2nd 860, C. C. A. 1. *In Re Gogal*, 75 F. Supp. 268, 271 D. C. (Penn.); *Schioler v. U. S.*, 75 F. Supp. 353, 355, D. C. (Ill.);

5. *Mackenzie v. Hare*, 239 U. S. 299, does not establish a contrary doctrine.

6. The uncertainty of the law referred to by the Commissioner of Immigration in holding that the petitioner was not an American citizen must be resolved in favor of the petitioner.

CONCLUSION.

ARGUMENT

I.

THE PETITIONER WAS NOT NATURALIZED IN THE FOREIGN STATE OF ITALY.

The Circuit Court of Appeals held that the petitioner was naturalized in the foreign state of Italy prior to the 13th day of January, 1941, which was the effective date of the Nationality Act of 1940 (R. 91). The decision of the Court of Appeals was bottomed upon the premise that the petitioner was naturalized in the foreign state of Italy under the provisions of the Act of 1907 before the Nationality Act of 1940 became effective (R. 91). The Court of Appeals concluded further that the status of the petitioner was the same whether its existence began before or after the enactment of the 1940 act (R. 91). Finally the Court of Appeals held that if removal from the United States was necessary in order to effect expatriation under either the Act of 1907 or the 1940 Nationality Act, the petitioner satisfied such conditions by taking up a foreign residence (R. 92).

The Court of Appeals in its decision ignored the plain language of the Act of 1907. Section 2 of the Act provides that an American citizen shall be deemed to have expatriated himself when he has been naturalized "in" any foreign state. Since the acts upon which the Court of Appeals relied to result in the naturalization in a foreign state,—applying for naturalization in and signing an oath of allegiance to the foreign state of Italy—occurred in the United States, the question is presented as to whether naturalization in a foreign state was accomplished.

The statute in express language requires the naturalization to take place "in" the foreign state. *Petition of Prack*, 60 F. 2d 171, (D. C. Penn.). The Court of Appeals, however, interpreted the statute as though it provided for expatriation when an American citizen had been naturalized "by" any foreign state. Had the Congress intended that any such meaning be attributed to the statute, it would have used apt language to that end.

Prior to the Act of 1907, the authorities uniformly held that citizenship in a foreign state was not acquired unless the American citizen established a permanent residence in the country in which citizenship was secured. *Talbot v. Jansen*, 3 Dall. (3 U. S.) 133, (1795); *The Santissima Trinidad*, 7 Wheat. (20 U. S. 283) (1822); *Comitis v. Parkerson*, 56 F. 556 (La. 1893).

After referring to the foregoing decisions the Court of Appeals said (R. 89):

> "All held that removal from the country, combined with a change in allegiance, was essential in accomplishing expatriation. This doctrine not only expressed the prevailing notions of the day as to what constituted expatriation, but also was a perpetuation of the historical concept of that term."

Subsequent to the enactment of the Act of March 2, 1907, the Department of State interpreted the Act as requiring permanent residence abroad in order to accomplish expatriation. On this point, the Court of Appeals in its decision said (R. 89):

> "From the enactment of the 1907 Act until the adoption of the Nationality Act of 1940, the Department of State consistently maintained in its rulings and consular advices that if an American citizen became nat-

uralized in or took an oath of allegiance to a foreign state while within this country, he was not expatriated unless and until he took up residence abroad. 3 Hackworth, *Digest of International Law*, 228-231. No court ever passed directly on this point. However, a dictum in *Ex Parte Griffin*, 237 Fed. 445 (D. C. N. Y.) (1916) was to the effect that the foresaking of one's own country was a usual concomitant of expatriation."

In a letter of instruction by the Department of State in 1933, the Department of State in holding that an American did not lose his citizenship through an oath of allegiance taken in the United States said: (3 Hackworth, *Digest of International Law*, 228-231)

"It is true that the first paragraph of Section 2 of the Act of March 2, 1907, which provides 'that any American citizen shall be deemed to have expatriated himself * * * when he has taken an oath of allegiance to any foreign state' does not contain a limitation upon the right of an American citizen to expatriate himself while continuing to reside in the United States. The construction which the Department has placed upon this law seems to be reasonable and carries out the long continued policy of the Department not to recognize any act of renunciation of American citizenship as resulting in expatriation, *unless accompanied by actual removal* from the country. The word 'expatriate' itself connotes by derivation the idea of leaving the country."

The ruling of the State Department recognized that the Act of March 2, 1907, like the Act of July 27, 1868, was merely declaratory of the law as it had existed prior to its enactment. *United States v. Karnuth*, 19 F. Supp. 581-582 (D. C. N. Y.).

In the teeth of the unbroken line of authority holding that citizenship in a foreign country was not acquired except by residence in such country and despite the monition of this Court in *Perkins v. Elg*, 307 U. S. 325, 337, that the right of citizenship is not to be destroyed by an ambiguity, the Circuit Court of Appeals upon the authority of *Mackenzie v. Hare*, 239 U. S. 299, held that the plaintiff had been naturalized in a foreign state (R. 89-90).

Section 3 of the Act of March 2, 1907, which was involved in *Mackenzie v. Hare*, 239 U. S. 299, provided that any American woman who married a foreigner "shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship by continuing to reside in the United States if she was residing in the United States at the time of such termination."

The Statute with respect to loss of citizenship by an American woman was clear and unambiguous and not open to construction. In accordance with the mandate of Congress and upon the existence of the marriage relation, the Statute became operative. It is important to note, however, that the Statute did not provide for permanent expatriation. Citizenship was restored automatically upon the termination of the marriage relation. Consequently the effect of the Statute was merely to suspend the right of citizenship, not to destroy it. If the wife continued to reside in this country, it was unnecessary for her to do anything more than to continue such residence upon the termination of the marriage relation in order to restore her citizenship. This provision in the Statute required the Court to interpret the Statute literally and prevented the court from engrafting a limitation upon the Statute which would preclude its operation in cases where the wife continued to reside in this country after her marriage.

The argument of the Court of Appeals in concluding that *Mackenzie v. Hare*, 239 U. S. 299, established the principle that subsequent removal from this country was not necessary to effect the expatriation of the United States citizen who took an oath of allegiance to a foreign state (R. 89-90) is a complete *non sequitur*. The Department of State in 3 Hackworth, *Digest of International Law*, 228-231 correctly defined the ambit of the decision in *Mackenzie v. Hare*, 239 U. S. 299, when it said:

> "'It might be contended that the decision of the Supreme Court of the United States, December 6, 1915, in the case of *Mackenzie v. Hare*, 239 U. S. 299, to the effect that an American woman who married an alien in the United States and continued to reside in this country lost her American citizenship, under the provision on Section 3 of the Act of March 2, 1907, is contrary to the views expressed above, and should be regarded as having overruled decisions of the courts to the effect that expatriation requires a removal from the United States. Such, however, is not believed to be the case, since the court took care to differentiate loss of citizenship by a woman through marriage to an alien from other cases of expatriation, and held that the provision of the statute in question merely served to confirm a rule generally recognized by states concerning 'the identity of husband and wife,' which was regarded as an 'ancient principle of our jurisprudence.' The court held in effect that the woman's citizenship became, under the provision of the statute, merged in that of her husband, regardless of their residence. Thus the case was essentially different from that of an individual who, while remaining in the United States, attempts to subject himself to the sovereignty of a foreign state, through the taking of an oath of allegiance thereto."

The requirement that naturalization in order to accomplish expatriation must take place "in" a foreign country and that the taking of an oath of allegiance does not result in expatriation unless residence is subsequently taken up abroad has been carried over into the Nationality Act of 1940. Section 403 of the Nationality Act of 1940, provides that except as provided in Subsections (g) and (h) of Section 401 (deserting the military or naval service of the United States or its outlying possessions, and that expatriation results from the performance of the acts only when the national thereafter takes up a residence abroad. If therefore the status of the petitioner became fixed under the Nationality Act of 1940, which we deny, the petitioner would not, nevertheless, have lost her citizenship unless she took up her residence abroad.

We therefore respectfully submit that the petitioner did not become naturalized "in" the foreign State of Italy either by virtue of her application for such citizenship or by virtue of an oath of allegiance to the State of Italy.

II.

THE PETITIONER DID NOT TAKE AN OATH OF ALLEGIANCE TO A FOREIGN STATE.

The argument has thus far proceeded upon the hypothesis that an oath of allegiance was in fact taken by the petitioner. The trial court found as a fact that the petitioner merely signed a statement containing an oath; that there was no ceremony in connection with the signature and that the petitioner did not in fact take an oath of allegiance to Italy (R. 66-67). This finding was based upon the un-

disputed fact that the document was in the Italian language, which petitioner could not read, write or understand (R. 65) and upon the further fact that petitioner was assured by her fiance that the signing of the document would merely result in a technical Italian citizenship, which status would in no way endanger her American citizenship (R. 67). Finally the trial court held that at the time the document was signed, petitioner had no intention of renouncing her allegiance to the United States (R. 66).

The Circuit Court of Appeals did not determine whether the petitioner took an oath of allegiance to the foreign state of Italy. In reciting the facts the Court of Appeals stated that the petitioner signed a document bearing an oath of allegiance to Italy (R. 87). The finding of the trial court that the oath for Italian citizenship was written in Italian is also referred to in the opinion of the Court of Appeals (R. 88). The Court of Appeals holds that under the 1907 Act, an American citizen could expatriate himself by becoming naturalized in or taking an oath of allegiance to a foreign state regardless of his removal from this country, but the Court of Appeals does not determine that the plaintiff took an oath of allegiance unless the finding "that the voluntary act of the plaintiff in obtaining Italian citizenship in 1940, effected a loss of her American citizenship" (R. 91) admits of such a finding. At all events the Court of Appeals refrained from analyzing the facts or referring to the decisions bearing upon the effect of the plaintiff's signature following the oath, or the fact that the petitioner did not in fact take an oath of allegiance to the foreign state of Italy.

The failure formally to administer an oath has been held not to constitute the taking of an oath within the mean-

ing of the Nationality Act. *In the Matter of E——, In Exclusion Proceedings*, decided by the Board of Immigration Appeals in 1943, Vol. 1, p. 548, Administrative Decisions Under Immigration and Naturalization Laws of the United States (1940-1943). The facts in such proceedings were as follows: E—— was born in Montana and when an infant was taken by his father to Canada where his father became a naturalized citizen. E—— later applied for enlistment in Canada and executed an oath of allegiance in 1939 but which was not attested to by an officer. E—— subsequently applied for admission to the United States as an American citizen. Notwithstanding the fact that his name was signed to the oath, he testified that he did not take an oath of allegiance at that time. The Board considered the Act of March 2, 1907, as the applicable statute in effect when he attempted to join the militia. In holding that there was insufficient supporting evidence of the intention of E—— to take the oath the Board of Immigration Appeals held:

> "This statute (the Canadian Act requiring the oath) requires two things be done, that the oath be taken and it be subscribed to. The appellant did subscribe to the form of oath, but there is nothing on record to indicate that he took the oath. To constitute a valid 'oath,' there must be in the presence of the person authorized to administer it, *an unequivocal act whereby the affiant consciously takes upon himself the obligation of an oath.* * * * We feel that the act of the appellant in *signing* the form of oath is not taking an oath within the meaning of Section 2 of the Act of March 2, 1907." *State v. Privitt* (1931) 327 Mo. 1194; *Weddock v. State* (1930) 118 Texas Cr. R. 537. (Italics supplied.)

The recent case of *In re Gogal*, 75 F. Supp. 268, (1947) considered the matter of an American born citizen taking an oath of allegiance in a foreign army. Petitioner in that case sought to establish his American citizenship on the ground that he did not knowingly and voluntarily take the oath. In finding for the petitioner, the court stated (page 270-271):

> "It is impossible for any person to swear before their God, or affirm, that certain things will be done or not done without knowing or hearing that to which the oath is being taken. * * * this oath at the most creates a presumption of expatriation on the part of the petitioner by service is in the armed forces of Czechoslovakia. However, the presumption may be rebutted and under the facts in the instant case I believe that the petitioner has met that burden of proof."

It should be borne in mind that the status of the petitioner was fixed under the Act of March 2, 1907. The document containing the oath of allegiance was signed by the petitioner on November 23, 1940 (R. 65). The Nationality Act of 1940 did not go into effect until January 13, 1941. The saving clause of the Nationality Act of 1940 provides that the 1940 Act shall not affect any act, thing or matter, done or existing at the time the Act took effect. It is apparent therefore, that the effect of the signing of the oath must be measured by the Act of March 2, 1907, and not by the Nationality Act of 1940.

In respect of the oath of allegiance, the Nationality Act of 1940 has a broader scope than the corresponding Act of March 2, 1907. Section 2 of that Act provides that an American citizen shall be deemed to have expatriated himself when he has taken an oath of allegiance to any foreign

state. Section 401 (b) of the Nationality Act of 1940 provides that a citizen of the United States shall lose his nationality "by taking an oath or making an affirmation, or other formal declaration of allegiance to a foreign state."

Under the law as it now stands, expatriation may be accomplished not only by taking an oath of allegiance but also by making an affirmation or other formal declaration of allegiance to a foreign state. The statute is not clear as to what will constitute "other formal declaration" but it is important to observe that the declaration must be formal. The broadened scope of Section 401 (b) of the Nationality Act of 1940 points to the conclusion that the mere signing of a statement containing an oath without any formality does not constitute the taking of the oath of allegiance to a foreign state within the purview of the Act of March 2, 1907.

III.

PETITIONER DID NOT TAKE UP A RESIDENCE ABROAD.

The trial court found that on July 15, 1941, the petitioner and her husband were compelled by executive order to leave this country, practically without notice and without any opportunity for any planned or considered departure (R. 65). The trial court further found that when the plaintiff left this country for Italy, she did so without any intention of establishing a permanent residence abroad, or abandoning her residence in the United States (R. 65).

The Court of Appeals rejected the findings of the trial court and held that the plaintiff took up a foreign residence

within the meaning of Section 403 (a) of the Nationality Act of 1940 and the 1907 Act.

Section 403 (a) of the Nationality Act of 1940 provides that no national may expatriate himself while in the United States, but that expatriation shall result "if and when the national thereafter takes up a residence abroad." Section 104 of the Nationality Act of 1940 provides that for the purpose of Section 403 "the place of general abode shall be deemed the place of residence."

The definition of the phrase "place of residence" is cast in the form of a definition of domicile. Funk & Wagnalls New Standard Dictionary defines "domicile" as a "place of abode." Undoubtedly the motivating force in using the word "residence" in Section 403 of the Nationality Act of 1940 was to avoid the complexities which might arise with respect to married women and to permit her to establish her own separate residence. Ordinarily the domicile of a married woman is that of her husband. *Anderson v. Watt*, 138 U. S. 694.

In determining the domicile or residence, it will be presumed that the domicile or residence once established continues until facts have been adduced to establish the contrary. *District of Columbia v. Murphy*, 314 U. S. 441, 455; *Anderson v. Watt*, 138 U. S. 694.

In establishing a legal domicile two factors are indispensable, first, residence in the new domicile, and second, the intention permanently to remain there. *Sun Printing & Publishing Association v. Edwards*, 194 U. S. 377, 383; *Gilbert v. David*, 235 U. S. 561, 569; *Mitchell v. United States*, 21 Wall. 350-353.

It thus appears clear that the Court of Appeals was in error in holding that under the Nationality Act of 1940, the petitioner had established a place of abode in Italy.

As we have previously pointed out the petitioner's status is dependent upon the Act of 1907. Hence it is not necessary for the Court to determine whether the petitioner established a place of abode under the Nationality Act of 1940.

Under the 1907 Act, the State Department in holding that expatriation could not result unless a permanent residence was established outside the United States, said (3 Hackworth, *Digest of International Law*, 231):

> "The Department wishes to point out that in a case where a person took an oath of allegiance to a foreign state while *residing* in the United States but who shortly thereafter took up a *permanent* residence outside of the United States, the Department would doubtless consider that the act of taking an oath of allegiance to a foreign state, coupled with the *permanent removal* from the United States, would result in the loss of American citizenship." (Italics supplied.)

Here again the construction adopted by the State Department conformed to the principles applied to the Act of 1868, to the effect that expatriation could not result unless there had been a bona fide change of domicile from this country to a foreign country. *The Santissima Trinidad*, 7 Wheat. 283, 348; *Comitis v. Parkerson*, 56 F. 556, 560 (C. C. La.).

In view of the findings of the trial court, it is clear that the petitioner did not intend to take up a residence in Italy or in any other foreign country, but that on the contrary she continued to maintain her residence and domicile in

the United States. The conclusion of the Court of Appeals to the contrary must therefore be vacated and set aside.

IV.

THE PETITIONER DID NOT VOLUNTARILY ABANDON HER AMERICAN CITIZENSHIP.

The District Court in the instant case made, among others, the following findings of fact (R. 64-67):

1. The plaintiff was a native born American;

2. That on or about August 1, 1940, at St. Louis, Missouri, at the suggestion of her then intended husband, Allesandro Savorgnan, plaintiff applied through the Italian Consulate at Chicago, Illinois, for Italian citizenship, and on November 23, 1940, at Chicago, Illinois, plaintiff at the request of said Savorgnan signed an Oath of Allegiance to the Italian government;

3. The application was made solely for the purpose of obtaining consent from the Italian government to plaintiff's marriage to Savorgnan who was, at the time, in the Diplomatic Service of Italy and located in this country;

4. The application and oath were both written in Italian, which language plaintiff could not, at that time, read, write or understand;

5. Plaintiff assumed that the signing of the documents was but a step in obtaining consent of the Italian government to her marriage;

6. Plaintiff married Savorgnan on December 26, 1940, at Waukon, Iowa;

7. At the time plaintiff signed the application for Italian citizenship and the Oath of Allegiance:

(a) She did so without any formal proceedings;

(b) She relied on her husband's statement and assurance that, by signing the documents, she merely acquired a technical Italian citizenship which status would, in no way, endanger her American citizenship;

(c) She had no present or fixed intention in her mind of renouncing her allegiance to this country and, in fact, never did intend to divest herself of American citizenship;

8. The plaintiff did not knowingly renounce or relinquish her American citizenship.

After reciting the substance of these findings and after adverting to the pronouncements of this Court in *Perkins v. Elg*, 307 U. S. 325 (1939), the District Court concluded that expatriation was a "matter of intent," that knowledge is necessary to intent, that plaintiff did not "knowingly renounce or relinquish her American citizenship" and that she was, therefore, entitled to judgment "declaring her to be an American citizen" (73 F. Supp. at p. 111).

Without questioning the District Court's findings of fact, the Court of Appeals reversed, holding that subjective intention, misinformation as to the legal consequences of her acts and motives for her conduct had no bearing at all on the question—the sole question being whether she intended to act as she did. Judge Swygert, writing for the Court of Appeals, stated:

> "If these factors were permitted consideration, the operation of the statute would depend not upon the voluntarily performed act of becoming naturalized in a foreign state, but upon the extent of the legal knowledge and the subjective intention or motivation of the

person involved. Such tests cannot be used to determine the operation of the statute." (171 F. (2d) at p. 159)

Why such tests cannot be used to determine the operation of this statute, the Court of Appeals did not say. In reviewing denaturalization proceedings this Court has found no such incapacity. Thus in *Knauer v. U. S.*, 328 U. S. 654 (1946) this Court affirmed the decision of the District Court, cancelling the petitioner's certificate of naturalization, in spite of the fact that the naturalization statutes had been technically complied with, on concurring in a finding that the petitioner (a former native of Germany) had taken his oath of allegiance to the United States without the subjective intention of foreswearing his allegiance to his land of birth. In the instant case surely petitioner, a native-born national, is entitled to an equally thorough and complete examination and consideration of her subjective intent and motivation. It is not reasonable to assume that what an alien must "intend" to acquire, a native-born national may lose regardless of his "intent." The expatriation statutes, dealing as they do with the precious right of nationality, cannot be applied to the acts of a national without due regard to all attendant circumstances, including his motivation and intention, and his understanding of the consequences of his acts. Failure to accord due weight to these elements runs counter to the spirit of *Knauer v. U. S.*, 328 U. S. 654 (1946) and to the decision of this Court in *Perkins v. Elg*, 307 U. S. 325, 334, 337, wherein Chief Justice Hughes stated that expatriation is "the voluntary renunciation or abandonment of nationality and allegiance" and wherein he cautioned that "rights of citizenship are not to be destroyed by an ambiguity."

The necessity for voluntary action in order to deprive an American of his citizenship is illustrated in *Dos Reis ex rel. Camara v. Nicolls*, 68 F. Supp. 773 D. C. (Mass.), 161 F. 2d 860, C. C. A. 1. There an American citizen was inducted into the Portuguese Army without his consent. At the conclusion of his military service he surreptitiously entered this country. He contended at the trial that the provisions of Section 401 (c) of the Nationality Act of 1940 that service in the armed forces of a foreign state results in loss of American nationality did not apply, because his foreign army service was not voluntary. The trial court rejected his contention and held that his army service effected expatriation (68 F. Supp. 776). Upon appeal, however, it was held (161 F. 2d 865-866) that unless such service was voluntary it did not result in loss of American citizenship. In the opinion on re-hearing, the Court said (161 F. 2d 868):

> "To 'expatriate' oneself clearly implies voluntary action. 'Expatriation is the voluntary renunciation or abandonment of nationality and allegiance.' Perkins v. Elg, 1939, 307 U. S. 325, 334, 59 S. Ct. 884, 889, 83 L. Ed. 1320. In this case Camara certainly overcame any presumption that he had voluntarily renounced or abandoned his American nationality and allegiance.
> * * *
>
> "We repeat the admonition of Perkins v. Elg, supra, at page 337 of 307 U. S., at page 891 of 59 St. Ct., 83 L. Ed. 1320: 'Rights of citizenship are not to be destroyed by an ambiguity.'"

Other authorities holding that expatriation is the voluntary renunciation or abandonment of nationality are:

30 Op. A. G. 412, 421

In Re Gogal, 75 F. Supp. 268, 271 D. C. (Penn.)

Schioler v. U. S., 75 F. Supp. 353, 355, D. C. (Ill.)

The principle which we contend to be controlling is not at war with *Mackenzie v. Hare*, 239 U. S. 299. In that case, the Citizenship Act of 1907 provided that any American woman "who marries a foreigner shall take the nationality of her husband." After the passage of the Act, an American woman married a subject of Great Britain in California. When she applied to register as a voter, her request was refused on the ground that she had ceased to be a citizen. The United States Supreme Court upheld such refusal despite the continued residence of the woman in the United States subsequent to the marriage. The Act of 1907 was held to be applicable because the woman had chosen to marry a foreigner in the face of a statutory provision that such marriage constituted a renunciation of American citizenship—"A condition voluntarily entered into with notice of the consequences," but in the opinion the Court was careful to add (page 311):

> "It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature * * *."

as, (page 312)

> "an answer to the apprehension of counsel that our construction of the legislation will make every act, though lawful, as marriage, of course, is a renunciation of citizenship."

The limitation imposed upon the scope of the decision in *Mackenzie v. Hare*, 239 U. S. 299, made it unnecessary for the Court to determine the power of Congress to enact

legislation depriving an American of citizenship except where his expatriation was voluntary. See *Dos Reis v. Nicolls*, 161 F. 2d 860, 862.

Finally, we again invite the attention of the Court to the reluctance of the Commissioner of Immigration in determining that the petitioner was not an American citizen. On the 28th day of June, 1946, the Acting Commissioner of Immigration advised the petitioner as follows (R. 1-2):

> "The matter was considered by the Commissioner, and in part he ruled as follows: 'The question is a perplexing one; the answer is not clear. Administrative practice over many years goes one way; the legal conclusions here expressed with persuasion go the other; the State Department has a third theory. This is the kind of matter which may never be settled with sureness until passed upon by the court. Accordingly, the case should be decided against the claimant in the pending administrative proceedings. She may then seek judicial review if she so chooses.'"

The petitioner followed the implied invitation of the Commissioner of Immigration to seek a judicial review of his finding, with the result that the trial court upon ample evidentiary grounds, concluded that the petitioner was an American citizen. The decision of the Court of Appeals to the contrary, therefore, should be reversed, and the judgment of the trial court should be affirmed.

CONCLUSION

In conclusion we submit that the trial court was right in holding that the petitioner had not lost her citizenship through marriage to her husband, but that she had continued to be an American citizen. In his decision, the Commissioner of Immigration frankly conceded that the plaintiff's status as a citizen was shrouded in uncertainty. The District Court had no difficulty in resolving the ambiguity in favor of the petitioner, as indeed is required by the decision in *Perkins v. Elg*, 307 U. S. 325, 337. No sound reason was advanced by the Court of Appeals for reversing the decision of the trial court. We therefore respectfully submit that the decision of the Court of Appeals should be reversed and the judgment of the trial court affirmed.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

Section 2 of the Act of March 2, 1907, (34 Statutes 1228, 8 U. S. C. Section 7, 1934 Edition) provides in part as follows:

> "Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state."

Sections 3 and 4 of the Act of March 2, 1907, as it existed prior to September 22, 1922, provided as follows:

> "Sec. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relaion, by coninuing to reside therein."

> "Sec. 4. That any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation."

On September 22, 1922, Sections 3 and 4 of the Act of 1907 were repealed and Section 3 was enacted to read as follows (42 Statutes 1022, 8 U. S. C. Section 9, 1934 Edition):

> "A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after March 3, 1931, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens."

Section 104 of the Nationality Act of 1940 (8 U. S. C. Section 504) provides that for the purpose of Section 403 of that Act, the term "place of residence" shall be as follows:

> "For the purposes of section * * * 403 * * * of this chapter the place of general abode shall be deemed the place of residence."

Section 347 of the Nationality Act of 1940 (8 U. S. C. Section 747) provides in part that it shall not be construed to:

> "* * * affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any act, thing, or matter, civil or criminal, done or existing, at the time this chapter shall take effect; but as to such prosecutions, suits, actions, proceedings, acts, things, or matters, the statutes or parts of statutes repealed by this chapter, are hereby continued in force and effect."

Section 401 of the Nationality Act of 1940 (8 U. S. C. Section 801) provides in part as follows:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(a) Obotaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person;

(b) Taking an oath or making an affirmation or other formal declaration to a foreign state; or

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; or

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(g) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial; or

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction."

Section 403 of the Nationality Act of 1940, (8 U. S. C. ection 803) provides:

"(a) Except as provided in subsections (g) and (h) of section 401, no national can expatriate himself, or be expatriated, under this section while within the

United States or any of its outlying possessions, but expatriation shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of the conditions specified in this section if and when the national thereafter takes up a residence abroad."